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Extraterritorial Jurisdiction: The Application of U.S. Antitrust Laws to Acts outside the United States—Hartford Fire Insurance Co. v. California, 113 S. Ct. 2891 (1993)

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EXTRATERRITORIAL JURISDICTION: THE APPLICATION OF U.S. ANTITRUST LAWS TO ACTS OUTSIDE THE UNITED STATES—*Hartford Fire Insurance Co. v. California*, 113 S. Ct. 2891 (1993)

I. INTRODUCTION

The extraterritorial reach of U.S. antitrust laws has long posed a perplexing problem for the United States, foreign governments, and the international business community.[1] Attempts to apply U.S. laws in cases involving foreign entities often pit U.S. policies and interests against the policies and interests of the United States' trading partners.[2] Unless the trading nations reach a consensus on antitrust policies, American courts will continue to face the difficult task of determining whether to exercise jurisdiction in cases implicating foreign law and activity.[3]

One judicial approach to this problem is to weigh the need to uphold U.S. antitrust laws and redress injured plaintiffs against the interests of foreign governments.[4] At some point in this balancing process, U.S. interests are sufficiently weak, and foreign interests sufficiently strong, to render judicial remedies in U.S. courts inappropriate.[5] The search for the definitive point at which this balance lies has created tension in international antitrust litigation.[6] Increasing foreign trade

1. *See generally* Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310 (1985).

2. *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 916 (D.C. Cir. 1984) (allowing airline industry suit to proceed despite British government and court refusal to permit discovery); *In re* Westinghouse Elec. Corp. Uranium Contract Litig., 563 F.2d 992, 996 (10th Cir. 1977) (noting that in antitrust matters compliance with the laws of one country may provide basis for prosecution in another).

3. *See* 1 BARRY E. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 20-29 (1991) (delineating extraterritorial policy implications currently faced by United States).

4. *See, e.g.*, Industrial Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884-85 (5th Cir. 1982), *cert. denied*, 464 U.S. 961 (1982) (implementing *Timberlane* test to assess conflict between American and Indonesian law); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979) (adopting *Timberlane* test with modifications); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976), *cert. denied*, 105 S. Ct. 3514 (1985) (formulating three-prong test that considers whether American interests are sufficiently strong, vis-à-vis foreign interests, to justify an assertion of extraterritorial jurisdiction). *But see Laker Airways*, 731 F.2d at 954 (rejecting balancing of government interests test as political, not judicial, function).

5. *See Timberlane*, 549 F.2d at 609, (recognizing that American interests may be weaker than foreign interests in some cases).

6. *See, e.g., Laker Airways*, 731 F.2d at 956 (exercising jurisdiction over British airline and causing impasse between United States and British governments). Additional problems are created when U.S. courts choose to rely solely on domestic law and interests. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 165 (1895) (proposing that in conflict of

will continue to compound existing problems until an internationally acceptable jurisdictional rule is established.

The United States Supreme Court recently illustrated the inadequacy and continued confusion of existing approaches in determining whether courts should exercise jurisdiction in antitrust cases involving foreign activities. In *Hartford Fire Ins. Co. v. California*,[7] the question presented was whether certain antitrust claims against London reinsurers should have been dismissed as an improper application of the Sherman Act to conduct by foreign corporations.[8] *Hartford* represents the Court's most recent decision on the application of U.S. antitrust laws to non-Americans.

The Court decided *inter alia*,[9] in a 5-4 decision,[10] that U.S. antitrust laws apply to conduct by non-Americans that occurs outside the United States if said conduct is intended to, and does, produce, a substantial effect in the United States.[11] The Court stated that notions of interna-

laws situations it is doubtful as to which law should prevail and whenever doubt does exist, the court that decides will prefer its own laws to those of another country).

As a result, foreign nationals and states often reject the soundness of U.S. extraterritorial adjudication as an exportation of unwelcome American economic and political values. *See* 1 HAWK, *supra* note 3, at 30 (noting potential negative foreign reaction to panoply of U.S. antitrust laws having broad extraterritorial reach).

7. 113 S. Ct. 2891 (1993).

8. *Id.* at 2908.

9. The Court also held that domestic insurers did not lose their McCarran-Ferguson Act immunity from federal regulation simply because they agreed or acted with foreign reinsurers allegedly not regulated by state law. *Id.* at 2892. This Comment focuses solely on the application of U.S. antitrust laws to foreign conduct by foreign parties.

10. Justices Souter, Rehnquist, Blackmun, White, and Stevens comprised the majority in *Hartford*. Justices Scalia, O'Connor, Thomas and Kennedy joined in the dissent.

11. *Id.* at 2910.

tional comity[12] "would not counsel against exercising jurisdiction in the circumstances alleged here."[13]

The Court's analysis focused primarily on section 402 of the Foreign Trade Antitrust Improvements Act of 1982.[14] Under this Act, the Sherman Act[15] does not apply to conduct involving nonimport foreign trade or commerce, unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce.[16] Finding the conduct had a direct effect on the U.S., the Court ruled that unless foreign law requires foreign citizens or corporations to act in a manner prohibited by U.S. antitrust laws, or unless compliance with the laws of both countries is otherwise impossible, self-imposed restraints on the exercise of jurisdiction based on international comity are inapplicable.[17]

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12. Although this Comment focuses only on the courts' authority to regulate extraterritorial conduct, comity plays a role in these decisions. Comity is the idea that courts of one state or jurisdiction recognize the laws of another state or jurisdiction as a matter of deference and mutual respect rather than out of obligation. BLACK'S LAW DICTIONARY 267 (6th ed. 1990). In conflicts with foreign jurisdictions, comity seeks to reconcile the territoriality or sovereignty of U.S. laws with the need to consider foreign laws. EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 2.4, at 12-13 (1984).

Historically, U.S. courts have expressed a variety of opinions regarding the issue of comity. Initially, "foreign judgments [were] never reexamined unless the aid of [U.S.] courts [was] asked to carry them into effect. The foreign judgment [was] held to be only prima facie evidence of the demand." *Id.* § 24.33, at 961-62 (citations omitted). Recently, however, U.S. courts have increasingly recognized the role of comity in foreign litigation. 1 JAMES ATWOOD & KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 2.19, at 38 (1st ed. 1961).

Historically, consideration of foreign views was apparently considered unpatriotic; this is no longer the case. Indeed, federal courts have encouraged the consideration of comity in antitrust enforcement. *See, e.g.*, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3rd Cir. 1979); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976), *cert. denied*, 105 S. Ct. 3514 (1985). *Cf. In re* Uranium Antitrust Litig., 617 F.2d 597 (7th Cir. 1980) (evidencing less enthusiasm toward the consideration of comity approach). Determining exactly how to incorporate foreign views with American interests is an issue with which U.S. courts are currently struggling. For a good discussion of the comity analysis, see Justice Scalia's dissenting opinion in *Hartford*. 113 S. Ct. 2891, 2911 (1993) (Scalia, J., dissenting).

13. *Hartford*, 113 S. Ct. at 2910.

14. 15 U.S.C. § 6a (1992). *See infra* part II.B.2.

15. 15 U.S.C. §§ 1-7 (1992). *See infra* part II.B.1.

16. 15 U.S.C. § 6a(1)(a) (1992). *See infra* part II.B.1-2 for a discussion of the relevant portions of the Sherman Act and the Foreign Trade and Antitrust Improvements Act applicable to *Hartford*.

17. *Hartford*, 113 S. Ct. at 2910-11. No conflict exists for these purposes, according to the Court, "where a person subject to regulation by two states can comply with the laws of both." *Id.* (citing RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. e (1987)). According to the majority, the only substantial question relative to whether the Court should have refrained from exercising jurisdiction under the Sherman Act is whether "there is in fact a true conflict between domestic and foreign law." 113 S. Ct. at 2910 (citing Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 555 (1987)). Since the defendants did not

Justice Scalia argued for the dissent that under the factors set forth in section 403 of the Restatement (Third) The Foreign Relations Law of the United States,[18] a nation having a basis for jurisdiction must refrain from exercising that jurisdiction if such an exercise would be unreasonable.[19] Justice Scalia argued that the majority "completely misinterpreted"[20] the Restatement (Third).[21] He also characterized the majority's holding that no true conflict exists "unless compliance with United States law would constitute a violation of another country's law"[22] as a "breathtakingly broad proposition" that contradicts established case law.[23] The dissent predicted that the majority's holding "will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries—particularly our closest trading partners."[24]

This Comment explores the implications of the *Hartford* decision in relation to the exercise of extraterritorial jurisdiction. The Comment first outlines the historical development of U.S. antitrust laws by looking at both the Sherman Act and the Foreign Trade and Antitrust Improvements Act of 1982.[25] This Comment then develops a perspective

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argue that British law required them to act in some manner prohibited by U.S. law, or claim that compliance with both laws was impossible, the Court held that there was not sufficient conflict to refuse the exercise of jurisdiction. *Id.* at 2910-11.

18. Under section 403(2) of the RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), the reasonableness of such an exercise of jurisdiction turns, in part, on the following factors:

> (a) the extent to which the activity takes place within the territory of [the regulating state];
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated;
> (c) the character of the activity to be regulated, the importance or regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted . . . ;
> (g) the extent to which another state may have an interest in regulating the activity;
> (h) the likelihood of conflict with regulation by another state.

Id. § 403(2)(a)-(c), (g)-(h).

19. *Hartford*, 113 S. Ct. at 2921. Justice Scalia commented:

> Rarely would these factors point more clearly against the application of United States law . . . . I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion.

Id.

20. *Id.* at 2922.
21. *Id.*
22. *Id.* at 2921-22.
23. *Id.* at 2922.
24. *Hartford*, 113 S. Ct. at 2922.
25. *See infra* part II.A-B.

on the extraterritorial reach of U.S. antitrust laws.[26] The Comment then examines the *Hartford* decision and concludes by identifying several questions and consequences left unanswered by the majority's opinion in *Hartford*,[27] and which future litigants must consider.

II. Historic Development of U.S. Antitrust Law

A. *Background*

The term antitrust refers to a fluid set of national policies originally designed in response to the emergence of American big business.[28] Antitrust violations usually stem from unlawful restraints of trade, price discrimination, price fixing, and monopolies.[29] The principal federal antitrust acts are the Sherman Act,[30] the Clayton Act,[31] the Federal Trade Commission Act,[32] and the Robinson-Patman Act.[33] In addition, most states have their own antitrust acts.[34]

Antitrust laws initially reflected broad, value-based policies which typified the countries' and the enacting Congresses' distaste and distrust of American business.[35] However, in the 1970s, courts began to cap the growing number of antitrust constraints.[36] This curtailment peaked in the 1980s.[37] In 1981, the Justice Department proclaimed that antitrust policies should be aimed only at eliminating inefficient transactions.[38] Further, the Department asserted that few transactions are actually inefficient or otherwise deserving of attention because the market is a capable barometer of such behavior.[39] Since that time, the government has focused antitrust enforcement efforts primarily on monopolization[40] and cartel formation.[41]

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26. *See infra* part II.C.
27. *See infra* part III.A.
28. Eleanor M. Fox & Lawrence A. Sullivan, Antitrust 1 (West 1989).
29. *Id.* at 28.
30. 15 U.S.C. §§ 1-7 (1992).
31. *Id.* §§ 12, 13, 14-19, 20, 21, 22-27 (1992); 29 U.S.C. §§ 52-53 (1992).
32. 15 U.S.C. § 45 (1992).
33. *Id.* §§ 13, 13a, 13b, 21a (1992).
34. *See, e.g.*, Minn. Stat. §§ 325D.49-D.66 (1992) (codifying Minnesota Antitrust Law of 1971).
35. *See* Fox, *supra* note 28, at 2.
36. *Id.*
37. *Id.*
38. *Id.* (following the lead of the Chicago school and preeminent economists like Judge Posner).
39. *Id.*
40. Fox, *supra* note 28, at 2. Monopolization violating the Sherman Act occurs when persons combine or aspire to exclude competitors from part of trade or commerce, providing they have power, intent, and purpose to exclude actual or potential competition. Davidson v. Kansas City Star Co., 202 F. Supp. 613, 617 (W.D. Mo. 1962).
41. A cartel is defined as "[a] combination of producers of any product joined together to control its production, sale, and price, so as to obtain a monopoly and restrict

B. *Antitrust Regulatory Acts*

1. *The Sherman Act*

The Sherman Act[42] is a fundamental component of the economic policy of the United States. The purpose of the Sherman Act is to preserve "free and unfettered competition as the rule of trade."[43] Free competition theoretically promotes efficient resource allocation, low prices and equality.[44] In order to effectuate these purposes, the Act provides causes of action to the government and private persons injured directly or indirectly by unlawful restraints of trade.[45] Moreover, the Act seeks to eradicate anticompetitive conduct occurring in interstate or international commerce.[46]

Theoretically, then, when foreign corporations or U.S. subsidiaries located abroad violate U.S. antitrust laws, they should be treated no

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competition in any particular industry or commodity. Such exist primarily in Europe, being restricted in [the] United States by antitrust laws. BLACK'S LAW DICTIONARY 215 (6th ed. 1990).

42. 15 U.S.C. §§ 1-7 (1992). Senator John Sherman introduced the Act and it became law in 1890. *See generally* HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 40-54 (1985) (discussing the policy and legislative history behind Sherman Act); LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 1-17 (1977) (discussing economic rationale and historical developments of Sherman Act).

This Comment focuses primarily on sections 1 and 2 of the Act. Section 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1 (Supp. 1994). Section 2 of the Act provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2 (1992).

43. Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958). Scholars have identified several policies as the basis for domestic antitrust laws. These include: 1) to promote competition and the benefits of competition, which are efficient resource allocation, lower prices, and premiums on innovation; 2) to reduce government regulation of the economy; 3) to provide a preference for decentralized decision making instead of economic or political power concentrations; 4) to provide maximum freedom of opportunity for businesses and customers; 5) to provide a standard of fair business conduct. *See* 1 HAWK, *supra* note 3, at 1-10 (listing economic, social, and political justifications for domestic application of the Sherman Act). *See also* CARL KAYSEN & DAVID F. TURNER, ANTITRUST POLICY: AN ECONOMIC & LEGAL ANALYSIS 11-18 (1959) (listing social, economic, and political considerations that underlie application of antitrust laws).

44. *See Northern Pac. Ry.*, 356 U.S. at 4-5 (explaining the economic and social policies Sherman Act is designed to promote).

45. *See, e.g.*, Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1168 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979) (noting that some circuits grant standing under antitrust law to all who fall within "target area" of conspiracy rather than requiring direct injury); *In re* Uranium Antitrust Litig., 473 F. Supp. 382, 401 (N.D. Ill. 1979) (acknowledging that the Sherman Act grants standing to all antitrust violations that injure directly and indirectly).

46. 15 U.S.C. § 1 (Supp. 1994).

differently than domestic corporations.[47] The Act applies as long as a "substantial, direct, and foreseeable" effect restraining American trade or commerce exists.[48]

2. *The Foreign Trade and Antitrust Improvements Act and Export Trading Company Act of 1982*

The Foreign Trade and Antitrust Improvements Act of 1982 ("FTAIA") and the Export Trading Company Act of 1982 ("ETCA") together comprise Public Law No. 97-290 which was enacted October 8, 1982.[49] The stated legislative purpose of the ETCA is, in part, to encourage increased export of U.S. goods and services by facilitating the formation of export trading companies and by easing the application of U.S. antitrust laws to certain export trade activities.[50]

The FTAIA stands as a separate title within Public Law 97-290.[51] Although the FTAIA does not contain an explicitly enacted legislative purpose, as does the ETCA,[52] the purposes of the FTAIA are clearly set forth in the Act's legislative history. These purposes substantially mirror the codified purpose of the ETCA. First, the FTAIA is intended to "encourage the business community to engage in efficiency producing

47. *See, e.g.*, United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927) (finding American importers in Mexico in violation of Sherman Act); United States v. Imperial Chem. Indus., 100 F. Supp. 504, 511 (S.D. N.Y. 1951) (determining that all violators of antitrust laws must expect to be required to answer for their violation).

48. *See* Foreign Trade and Antitrust Improvements Act of 1982, 15 U.S.C. § 6(a) (1992) (providing that the Sherman Act will not apply to restraints on American foreign commerce unless conduct has direct, substantial, and reasonably foreseeable effect). *See also* RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987) (providing that state may not apply Sherman Act to conduct of persons having connection with another state unless that conduct has substantial, direct, and foreseeable effect).

49. 15 U.S.C. §§ 4001-4003 (1992); 12 U.S.C. §§ 372, 635a-4, 1841, 1843 (1982); 15 U.S.C. §§ 4011-4021 (1992); *Id.* §§ 1, 6a, 45(a) (1992).

50. The purpose of the ETCA is "to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers . . . and by modifying the application of the antitrust laws to certain export trade." 15 U.S.C. § 4001(b) (1992). This legislative purpose does not apply to the FTAIA, which is a separate title within Public Law 97-290 with no cross references to or use of the defined terms from the other titles.

51. The FTAIA provides:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless —(1) such conduct has a direct, substantial, and reasonably foreseeable effect —
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations . . .

15 U.S.C. § 6a (1992).

52. *See supra* note 50.

joint conduct in the export of American goods and services."[53] Second, the FTAIA is intended to amend the Sherman Act and the Federal Trade Commission Act to articulate a statutory test for determining whether U.S. antitrust jurisdiction applies to certain international transactions.[54]

Under section 402 of the FTAIA, the Sherman Act does not apply to conduct involving nonimport foreign trade or commerce unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce.[55] Thus FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy.[56]

C. *The Extraterritorial Reach of U.S. Antitrust Laws*

The extraterritorial reach of the Sherman Act has been uncertain since its enactment[57] and courts have struggled to develop a rule of law that is capable of uniform application.[58] In an effort to overcome this uncertainty, courts have often sought to incorporate domestic and foreign interests into the Act's extraterritorial reach.[59]

Initially, the Court narrowly construed the extraterritorial reach of the Sherman Act. In *American Banana Co. v. United Fruit Co.*,[60] the plaintiff alleged that the defendant monopolized the Central American banana trade by acquiring several Costa Rican and Panamanian

53. H.R. Rep. No. 686, 97th Cong., 2d Sess. 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487.

54. *Id.*

55. 15 U.S.C. § 6a(1)(a) (1992).

56. H.R. Rep. No. 686, *supra* note 53.

57. *See, e.g.*, United States v. Sisal Sales Corp., 274 U.S. 268, 275-76 (1927) (holding that Sherman Act jurisdiction extends to anticompetitive behavior occurring outside the United States if conduct restrains American commerce); American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (holding that the Sherman Act does not transcend United States territory to reach anticompetitive conduct that restrains American trade); International Ass'n of Machinists v. OPEC, 649 F.2d 1354, 1369 (9th Cir. 1981), *cert. denied*, 459 U.S. 1163 (1982) (holding that the Sherman Act does not reach foreign governments that have combined to restrain American trade); United States v. Alcoa, 148 F.2d 416, 444 (2d Cir. 1945) (holding that Sherman Act jurisdiction extends to anticompetitive conduct that intends to effect and does effect American commerce).

58. *See, e.g.*, Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976), *cert. denied*, 105 S. Ct. 3514 (1985) (formulating balancing test of American interests against foreign interests); United States v. Alcoa, 148 F.2d 416, 444 (2d Cir. 1945) (formulating effects test); Dominicus Americana Bohio v. Gulf & W. Indus., 473 F. Supp. 680, 688 (S.D. N.Y. 1979) (placing burden on defendant to show strength of foreign government interest precludes Sherman Act application).

59. *See, e.g.*, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979) (adopting *Timberlane* test with modifications). *But see* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 950 (D.C. Cir. 1984) (contending that courts are ill-equipped to balance foreign policy interests in antitrust suits).

60. 213 U.S. 347 (1909).

fruit distributors in violation of the Sherman Act.[61] The Court held that the Sherman Act could not reach anti-competitive conduct occurring outside the jurisdiction of the United States.[62]

In reaching this conclusion, the Court stated that the law of the country in which the conduct occurred would determine that conduct's lawfulness.[63] The Court explained that any broader exercise of jurisdiction would interfere with the sovereign authority of the foreign country.[64] In taking this view, the Court confined application of the Act's "operation and effect to the territorial limits over which the [American] lawmaker has general and legitimate powers."[65]

Subsequent to *American Banana*, the Court broadened the Sherman Act's jurisdictional reach to include acts performed in foreign states, even in the presence of foreign interests.[66] In *United States v. Sisal Sales Corp.*,[67] the defendants allegedly monopolized the export to the United States of sisal, a plant used to make rope, through the use of favorable Mexican legislation and a Mexican corporation.[68] The Court held that the Sherman Act applied because this conduct restrained trade in the United States.[69] The Court distinguished *American Banana*, noting that the defendants in *Sisal* entered into the conspiracy in the United States.[70] In so doing, the Court effectively expanded *American Banana*'s territorial limitation on the Act's reach.[71]

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61. *Id.* at 355-57.

62. *Id.* at 355.

63. *Id.* at 356.

64. *Id.*

65. American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909). Justice Holmes wrote: "[w]ords having universal scope, such as '[e]very contract in restraint of trade,' '[e]very person who shall monopolize,' etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch." *Id.*

66. *See, e.g.*, United States v. Pacific & Arctic Ry. & Navigation Co., 228 U.S. 87, 105 (1913) (holding that agreement between American and Canadian nationals to fix prices on transportation route from continental United States to Alaska was violation of antitrust laws); United States v. American Tobacco Co., 221 U.S. 106, 189 (1911) (holding that territorial allocation agreement executed in England between American and British nationals is subject to United States antitrust laws).

67. 274 U.S. 268 (1927).

68. *Id.* at 273.

69. *Id.* at 276.

70. *Id.* at 275-76. In *Sisal*, the Court found that the bank loans and other agreements that furthered the conspiracy were consummated in the United States. *Id.* at 272.

71. 1 HAWK, *supra* note 3, at 23-26 (suggesting that *American Banana* and *Sisal Sales* are not factually distinguishable and, therefore, the latter overruled the former). The Supreme Court has since discredited the holding in *American Banana*. *See, e.g.*, Continental Ore v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962) (holding that conduct partly occurring in a foreign country does not remove conspiracy to restrain foreign commerce of United States from Sherman Act jurisdiction).

Of greater importance to the current state of the law is *United States v. Aluminum Co. of America*[72] ("*Alcoa*"). The government brought suit[73] primarily to break Alcoa's monopoly on the U.S. aluminum trade and to challenge alleged international arrangements of Alcoa and Aluminum Limited ("Limited"), a Canadian corporation.[74] Limited was once owned by Alcoa, and a majority of Limited stock was still owned by the same U.S. interests that controlled Alcoa.[75]

The Second Circuit, acting for the Supreme Court,[76] articulated in *Alcoa* the "effects" test for determining federal jurisdiction over foreign companies.[77] Under the effects test, the United States obtains jurisdiction over wholly foreign conduct only if the actors intended to restrain U.S. commerce.[78] In addition, there must actually be an adverse effect upon American imports or exports.[79] The United States can not reach the foreign conduct if either element is absent.[80] According to the court's analysis:

> [T]he only question is whether Congress intended to impose the liability and whether our own Constitution permitted it to do so; as a court of the United States we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers . . . . We should not impute to Congress an intent to punish all whom its courts can catch for conduct which has no consequences within the United States.[81]

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72. 148 F.2d 416 (2d Cir. 1945).

73. The United States brought the action in *Alcoa* under 15 U.S.C. § 4 and sought a determination that Alcoa was monopolizing interstate and foreign commerce, particularly with regard to the sale of "virgin" aluminum ingot and that Alcoa be dissolved. *Id.* at 421.

74. ATWOOD & BREWSTER, *supra* note 12, § 6.05, at 147.

75. *Id.*

76. The appeal went to the Second Circuit court because the Supreme Court was unable to achieve a quorum of six justices. *See* 15 U.S.C. § 29 (1992). *See also* ATWOOD & BREWSTER, *supra* note 12, § 6.05, at 147.

77. 148 F.2d at 443. The Second Circuit accepted the district court's findings that Alcoa and Limited were operating at arms length and that Alcoa had not participated in the foreign arrangements that were under attack. *Id.* at 439-42. By doing so, the panel narrowed the international scope of the case to the legality of Limited's participation in a cartel of European aluminum producers that imposed quotas on members' aluminum production, including production exported to the United States. ATWOOD & BREWSTER, *supra* note 12, § 6.05, at 147.

78. 148 F.2d at 443.

79. *Id.*

80. *Id.*

81. *Id.* at 443.

In applying the effects test, the court found that the Sherman Act reached the conduct complained of in *Alcoa*.[82] Despite the sharp reaction by foreign governments to *Alcoa*'s effects test,[83] American courts have firmly concluded that the Sherman Act grants extraterritorial jurisdiction.[84]

In response to the criticism of *Alcoa*, United States courts began to develop jurisdictional tests[85] that incorporated the principle of "comity".[86] For example, the Supreme Court held in *Continental Ore Co. v. Union Carbide & Carbon Corp.*[87] that "[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries."[88] Comity, under this approach, requires that at some point American antitrust interests are too weak and foreign interests too strong for a U.S. court to assert jurisdiction.[89] By the use of this doctrine, U.S. courts hoped to effec-

82. *Id.* at 444-45. The court concluded that Limited's participation in the cartel violated the Sherman Act. *Id.* The court further held that the intent requirement of the effects test was met by the cartel's agreement to maintain quotas on aluminum shipped to the United States. *Id.* Finally, with regard to the proven effects requirement of the test, the court held that "[w]e think, however, that after the intent to affect imports was provided, the burden of proof shifted to Limited." *Id.* Because the district court found that the government had not proven an affect on imports, not that Limited had proven the absence of an effect, this burden shift was decisive. *Id.*

83. *See, e.g.*, A.D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA (365-72) (2d ed. 1970). Neale notes that obtaining jurisdiction through the service of subpoenas becomes more difficult when the foreign companies are wholly foreign with little or no U.S. participation in their control. *Id.*

84. *See, e.g.*, Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 610 (9th Cir. 1976), *cert. denied*, 105 S. Ct. 3514 (1985).

85. *See, e.g.*, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 703 (1962) (applying a balancing of foreign interests test); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298 (3d Cir. 1979) (adopting *Timberlane* approach with modifications); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976), *cert. denied*, 105 S. Ct. 3514 (1985) (adopting comity approach as one element of three prong test).

86. The Court has defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 164 (1895). See *supra* note 12 for a discussion of the issue of comity.

87. 370 U.S. 690 (1962).

88. *Id.* at 704. The *Continental Ore* Court upheld U.S. jurisdiction over a U.S. company's Canadian subsidiary that had restrained the export sales of another U.S. company. *Id.* at 710.

89. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 609 (9th Cir. 1976), *cert. denied*, 105 S. Ct. 3514 (1985).

tively balance American interests against recognized foreign interests when applying the Sherman Act.[90]

On another occasion, the Supreme Court held that U.S. and foreign corporations engaged in anticompetitive behavior occurring partly within and partly outside the United States are subject to U.S. jurisdiction under the Sherman Act if the challenged behavior has an anticompetitive effect in the United States.[91] The Court has also held that U.S. businesses are not free to participate in anticompetitive activity outside the United States if the conduct has an anticompetitive effect in the United States.[92]

Although the Court had previously considered foreign government interests in analyzing extraterritorial jurisdiction,[93] the Ninth Circuit, in *Timberlane Lumber Co. v. Bank of America*,[94] formally expanded the effects test to include the notion of international comity. The *Timberlane* facts are strikingly similar to *American Banana*'s. Timberlane was a United States company that, together with affiliates, attempted to establish a lumber operation in Honduras for the purpose of exporting lumber to the United States.[95] The existing Honduran lumber companies were predictably upset with the prospect of additional competition.[96] Thus, when Timberlane attempted to enter the Honduran lumber market through acquisition of a failing company, there was a concerted effort to drive the company out of the country.[97]

The Ninth Circuit held that the effects test was incomplete by itself because "it fails to consider other nations' interests."[98] The court also held that the effects test does not "expressly take into account the full nature of the relationship between the actors and [the United States]."[99]

The Ninth Circuit adopted a tripartite test to determine whether courts should exercise extraterritorial jurisdiction.[100] First, the alleged restraint must affect, or have been intended to affect, the foreign com-

90. *See id.* at 612 (holding that courts must consider whether interests of and links to United States are sufficiently strong vis-a-vis foreign interests to justify extension of jurisdiction).

91. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 396 U.S. 100, 104 (1969).

92. *See* Timken Roller Bearing Co. v. United States, 341 U.S. 563, 569 (1961).

93. *See supra* notes 85-92.

94. 549 F.2d 597 (9th Cir. 1976), *cert. denied*, 105 S. Ct. 3514 (1985).

95. *Id.* at 604-05.

96. *Id.* at 604.

97. The existing firms' principal weapon against Timberlane was a refusal to settle the debts of Timberlane's bankrupt predecessor, which Timberlane had assumed. *Id.* The defendants, rather than settling the debts, obtained a court order embargoing Timberlane's business. *Id.*

98. *Id.* at 611-12.

99. *Timberlane*, 549 F.2d at 612.

100. *Id.* at 613.

merce of the United States.[101] Second, if there was restraint, the conduct must be a cognizable violation of the Sherman Act.[102] Finally, a court should not exercise jurisdiction if doing so would be a violation of international comity and fairness.[103]

Under the third prong of the *Timberlane* test, the Ninth Circuit considered whether "the interests of, and links to, the United States" were strong enough in relation to the interests of other nations to justify asserting extraterritorial jurisdiction.[104] The court listed seven factors to consider in weighing the interests of the nations involved:

> 1) the degree of conflict with foreign law or policy;
> 2) the nationality or allegiance of the parties and the locations or principal places of business of corporations;
> 3) the extent to which enforcement by either state can be expected to achieve compliance;
> 4) the relative significance of effects on the United States as compared with those elsewhere;
> 5) the extent to which there is an explicit purpose to harm or affect American commerce;
> 6) the foreseeability of such effect; and
> 7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[105]

The court noted that in considering foreign interests, no determination would be made regarding the validity of foreign law or policy.[106] Instead, foreign interests were presumed to be legitimate and the analysis was one of determining the relative involvement of competing interests; if the interests of the United States prevailed, the court would exercise jurisdiction.[107]

The *Timberlane* analysis was subsequently recognized by the Third Circuit in *Mannington Mills, Inc. v. Congoleum Corp.*[108] In *Mannington Mills*, the plaintiff alleged that Congoleum fraudulently secured foreign patents,[109] and that such actions violated antitrust laws if the fraud was committed in the domestic market.[110] Congoleum argued that American courts could not question the validity of foreign patents.[111]

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101. *Id.* This first prong is essentially *Alcoa*'s effects test. *See supra* notes 76-82.
102. *Timberlane*, 549 F.2d at 613.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 614.
107. *Timberlane*, 549 F.2d at 615 n.34.
108. 595 F.2d 1287, 1297-98 (3d Cir. 1979).
109. *Id.* at 1290-91.
110. *Id.*
111. *Id.* at 1291. Congoleum procured the patents in New Zealand, Canada, Australia, and Japan. *Id.* at 1290.

Rather than undertaking a wholesale adoption of the *Timberlane* factors, the court developed a separate set of factors to consider in determining whether to exercise jurisdiction.[112] The court determined that international antitrust cases required a balancing of the interests of the United States against those of each of the countries involved.[113]

The *Timberlane* analysis has also been adopted in other circuits.[114] Moreover, the RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES adopted an approach similar to *Timberlane*'s in 1987.[115] However, the *Mannington Mills/Timberlane* analysis has generated much confusion and criticism.[116]

One criticism is that when applying the test there is no clear interaction of the three prongs.[117] Some courts have adopted the jurisdiction and comity analysis as separate considerations.[118] Other courts have treated comity as an integral part of jurisdictional determination.[119]

Another criticism is that the test is unworkable. For example, one court has queried whether federal judges have the expertise and authority to assess the importance of a foreign country's policies.[120]

Moreover, an interested foreign state may justifiably view as suspect a process that permits American judges to balance directly conflicting

112. *Id.* at 1297. The *Mannington Mills* court supplemented the *Timberlane* factors with the following: 1) the possible effect on foreign relations should the court exercise jurisdiction; 2) whether the party sanctioned will be forced to comply with divergent legal standards; 3) whether the remedy would be acceptable in the United States if issued by a foreign nation under similar circumstances states; and 4) whether there was a treaty controlling the issue. *Id.*

113. *Mannington Mills*, 595 F.2d at 1297-98.

114. *See* Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884-85 (5th Cir. 1982), *cert. denied*, 464 U.S. 961 (1983); Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 869-70 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982).

115. *See supra* note 18.

116. *See, e.g.*, Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 948-49 (D.C. Cir. 1984) (holding that the *Timberlane* factors are not useful in resolving controversy); *In re* Uranium Antitrust Litig., 617 F.2d 1248, 1255 (7th Cir. 1980) (holding that the failure to apply *Mannington Mills* analysis was not an abuse of discretion).

117. *See* Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1314 n.19 (1985) (acknowledging dispute over whether to use balancing test when determining jurisdiction).

118. *See, e.g.*, Industrial Dev. Corp. v. Mitsui & Co., Ltd., 704 F.2d 785 (5th Cir. 1983) (viewing balancing test as abstention doctrine rather than jurisdictional test); *In re* Uranium Antitrust Litig., 617 F.2d 1248, 1255 (7th Cir. 1980) (holding that once jurisdiction is ascertained, court should use balancing test to consider whether to exercise it).

119. *See, e.g.*, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1299 (3d Cir. 1979) (Adams, J., concurring) (arguing that comity considerations should be part of jurisdictional determination); Daishowa Int'l v. North Coast Export Co., 1982-2 Trade Cas. (CCH) ¶ 64,774, at 71,789 (N.D. Cal. 1982) (interpreting comity analysis as an integral aspect of jurisdictional test).

120. *See In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) (asserting that courts are ill-equipped to rule on relative importance of vital national interests).

national interests.[121] Even if judges possess the requisite expertise, the case-by-case approach necessitated by the balancing test precludes the development of a coherent body of law.[122] A court's failure to cautiously weigh the foreign policy ramifications of exercising jurisdiction in a sensitive manner may offend a foreign government rather than solve the antitrust conflicts.

III. HARTFORD FIRE INSURANCE CO. v. CALIFORNIA

A. *Introduction*

In 1988, attorneys general from nineteen states[123] and a number of private plaintiffs[124] brought actions against several U.S. and British insurance companies, reinsurance companies, underwriters, insurance brokers, private individuals, and the Insurance Services Office, Inc. (ISO).[125] The plaintiffs' charges rested on a variety of ostensible conspiracies, boycotts, threats, intimidation, and other coercive conduct by the defendants that allegedly restricted the availability of certain coverage under policies for commercial general liability (CGL) and property insurance.[126] The actions were consolidated for litigation and the district court granted the defendants' motion to dismiss.[127]

The district court held that the significant conflict with English law that would result from the extraterritorial application of U.S. antitrust laws in this case outweighed the other factors in the comity analysis.[128] However, the Ninth Circuit Court of Appeals reversed the trial court's

121. *See, e.g.*, Laker Airways Ltd., v. Sabena, Belgian World Airlines, 731 F.2d 909, 953 (D.C. Cir. 1984) (asserting that proclamation by judicial fiat that one state's interest is more important than another's will not erase real conflict); *In re Uranium Antitrust Litig.*, 480 F. Supp. at 1148 (finding that American antitrust law is irreconcilable with foreign government nondisclosure legislation).

122. *See* David Aronofsky, Comment, *Private Antitrust Actions Against Foreign States: Problems and Issues after International Association of Machinists & Aerospace Workers v. OPEC*, 17 TEX. INT'L L.J. 433, 472 (1982) (asserting that interests unique to each case preclude consistent determination).

123. The states that initially filed claims were Alabama, Alaska, Arizona, California, Colorado, Connecticut, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, Ohio, Pennsylvania, Washington, West Virginia, and Wisconsin. *In re* Insurance Antitrust Litig., 723 F. Supp. 464, 491 (N.D. Cal. 1989).

124. Private plaintiffs included, among others, Ace Check Cashing, Inc., Acme Corrugated Box Co., Bay Harbor Park Homeowners Association, Inc., and Big D Building Supply Corp. *Id.*

125. *Id.* at 468. The ISO is an association of more than 1000 property and casualty insurers, including defendants Hartford Fire Insurance Company ("Hartford"), Allstate Insurance Company ("Allstate"), Aetna Casualty and Surety Company ("Aetna"), and CIGNA Corporation ("CIGNA"). *Id.* at 468. The ISO is licensed as a rating, rate service, and advisory organization in all fifty states. *Id.*

126. *Id.*

127. *Id.*

128. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 490.

holding and rejected the conclusion that the principle of international comity barred the court from exercising Sherman Act jurisdiction.[129] The Supreme Court subsequently affirmed the appellate court's decision regarding the extraterritorial application of U.S. antitrust laws.[130]

B. Background

The sequence of events that culminates in the purchase of reinsurance[131] and retrocessional[132] insurance in the London markets typically begins with the purchase of primary insurance by an individual consumer. The primary insurer in the United States may then elect to insure all or a portion of the underwritten risks with reinsurers in the U.K.[133]

The London insurance markets in which the defendants conduct their reinsurance and retrocessional insurance business comprise underwriters at Lloyd's of London, other London insurance firms ("London Company Market" firms), and brokers who obtain coverage in these markets.[134] The purchase and sale of insurance in London takes place on the floor of the underwriting room at Lloyd's and in the offices of individual insurance companies.[135]

A Lloyd's or London Company Market agent evaluates and negotiates proposed insurance placements brought by brokers for considera-

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129. *In re* Insurance Antitrust Litig., 938 F.2d 919, 934 (9th Cir. 1991).

130. Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2894 (1993).

131. Reinsurance is "insurance for an insurer; a contract by which an insurer procures a third person (usually another insurance company) to insure it against loss or liability, or a portion of such, by reason of the original insurance." BLACK'S LAW DICTIONARY 1287 (6th ed. 1990).

132. Retrocessional insurance arises out of a transaction in which the primary insurer transfers some of the risk of insuring a party to another insurer. ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW 683-84 (1987). Jerry further explains:

> [t]he act of transferring the risk is called 'ceding,' and the portion of the risk passed to the reinsurer is called the 'cession.' An insurer that assumes reinsurance may in turn cede to another insurer a portion of the exposure reinsured. This transaction is called a 'retrocession' and the second reinsurer is known as a 'retrocessionaire.'

Id.

133. The form of reinsurance most pertinent to this case is known as "treaty" reinsurance in which the reinsurance company agrees in advance to indemnify a primary insurance company for a defined portion of the risks it accepts during the treaty period. *In re* Insurance Antitrust Litig., 723 F. Supp. 464, 485 (N.D. Cal. 1989). A reinsurer does not deal directly with primary insurance consumers and may never know the identity of individual risks with the portfolio of risks included in the treaty. Excess and Casualty Reinsurance Ass'n. v. Insurance Comm'r, 656 F.2d 491, 492, 495 (9th Cir. 1981).

134. *In re* Insurance Antitrust Litig., 723 F. Supp., 464, 485 (N.D. Cal. 1989). *See also* Edinburgh Assurance Co. v. R.L. Burns Corp., 479 F. Supp. 138, 144 (C.D. Cal. 1979), *aff'd in part and rev'd in part on other grounds*, 669 F.2d 1259 (9th Cir. 1982).

135. *Edinburg h Assurance Co.*, 479 F. Supp. at 147.

tion by the syndicate of underwriters the agent represents.[136] A "slip"[137] is presented to each underwriter.[138] The responsible broker typically circulates the slip among numerous underwriters because many of the risks are too large to be insured by just one London market participant.[139] As a result of this spreading of risk, negotiations over the terms and conditions on which risks will be accepted and insured are integral to the functioning of the market.[140]

C. *Facts*

In the late 1970s, ISO began to revise the industry CGL insurance[141] form. ISO filed two revised policy forms for CGL insurance with state insurance departments in 1984.[142] The proposed forms substantially reduced the coverage previously available to insureds.[143] The proposed claims-made form[144] modified insurers' exposure to long tail risks[145] and shifted the risk of future loss to insureds.[146] The other proposed form was a modified occurrence-based form.[147]

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136. *Id.*

137. A slip is a broker originated document containing the essential features of the coverage sought. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 485.

138. *Edinburgh Assurance Co.*, 479 F. Supp. at 145.

139. *Id.*

140. *Id.*

141. CGL insurance protects insureds against the risk of liability to third parties. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 468. CGL insurance is primarily purchased by businesses, nonprofit organizations and governmental entities. *Id.* Hartford, Allstate, Aetna, and CIGNA are primary insurers that are principal providers of CGL insurance. *Id.* ISO provides the policy forms upon which CGL insurance is predominately written and on behalf of its members files standardized policy forms with state insurance departments. *Id.* ISO also provides standardized policy forms for property and casualty insurance that comply with state and federal regulations and will be accepted by state insurance departments and collects historical loss data, calculates advisory rates for insurance, and projects future loss trends. *Id.* at 468-69.

142. *Id.* at 469

143. *Id.* One of the forms was a "claims-made" policy under which coverage was limited to claims made only during the policy period, regardless of when the occurrence giving rise to liability actually took place. *Id.* This represented a reduction in coverage previously available under "occurrence-based" CGL forms which provided coverage for claims arising out of occurrences during the policy period, regardless of when the claim was eventually asserted. *Id.*

144. A claims made policy is one in which "the insured is indemnified for claims made during the policy period regardless of when the acts giving rise to those claims occur." BLACK'S LAW DICTIONARY 807 (6th ed. 1990) (citing Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 59 (3d Cir. 1982)).

145. "Long tail risks" are risks that could arise long after the policy period expires. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 469.

146. *Id.*

147. An occurrence policy is one that "provides for indemnity, regardless of when [the] claim is made or reported, if [the] act giving rise to the claim occurred during [the] policy period." BLACK'S LAW DICTIONARY 808 (6th ed. 1990) (citing Yazoo County, Miss. v. International Surplus Lines Inc., 616 F. Supp. 153, 154 (D. Miss. 1985)).

The proposed forms became the target of widespread debate in the insurance industry. Opinions differ regarding what should trigger coverage, whether defense costs should be limited by the proposed forms, whether the retroactivity of the claims-made forms should be limited, and whether various pollution exclusion provisions should be modified.[148]

In the district court, the plaintiffs alleged that defendants Hartford, Allstate, CIGNA, and Aetna engaged in a concerted effort to prohibit the adoption of the 1984 proposed forms because the forms did not sufficiently confine their liability or coverage limits.[149] The plaintiffs also alleged that the defendants conspired with various domestic and foreign reinsurance companies and underwriters to boycott[150] the proposed forms unless a retroactive date was added to the claims-made form, and a pollution exclusion and defense costs cap were added to both forms.[151]

As a result of the defendants' efforts, the ISO executive committee voted in September 1984 to establish retroactive cut-off dates in the claims-made form, to exclude pollution coverage from both forms and to offer an occurrence-based form in conjunction with the new claims-made form.[152] However, ISO refrained from including a defense-costs cap in either form.[153]

Following this vote, ISO, together with Hartford, Aetna, and representatives of the London reinsurance industry, undertook efforts to promote the new forms.[154] Reinsurers, for example, refused to accept new reinsurance business and refused old business unless the primary insurer agreed to use the claims-made form when available.[155] Reinsurers also imposed "sunset dates"[156] in their policies which limited exposure to losses that occurred after specified times on occurrence-

148. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 469.

149. *Id.*

150. Plaintiffs alleged that as a result of their efforts, Hartford, Allstate, Aetna, and CIGNA, together with a variety of domestic and London reinsurers, threatened to boycott North American CGL risks unless the desired changes were made to the claims-made form and the occurrence-based form was eliminated altogether. *Id.*

151. *Id.*

152. *Id.*

153. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 469.

154. *Id.*

155. *Id.*

156. Sunset clauses limit the reinsurer's liability to those claims presented to it by the primary insurer prior to a specified date. *Id.* at 475 n.18.

based forms.[157] They also agreed to exclude pollution liability coverage from reinsurance agreements.[158]

As these events were occurring, ISO filed the proposed forms with the insurance departments in all fifty states.[159] Insurance departments in thirty-five states subsequently held a series of public hearings, and the proposed forms were discussed in industry and public forums.[160] ISO filed several revisions of the proposed forms with all fifty state insurance departments in response to reaction from these various venues.[161] At the conclusion of these events,[162] various states approved the new ISO forms,[163] and ISO withdrew data collection efforts and risk estimation support for the pre-1984 CGL forms.[164]

D. Court Holdings

1. The District Court

The district court first determined that the FTAIA[165] did not apply to the defendants' conduct.[166] The court found that the plaintiffs adequately alleged that a decision by the defendants to not provide reinsurance or retrocessional reinsurance to cover certain types of risks in the United States had a direct and substantial effect on the availability of insurance in the United States.[167] The court then turned to the tripartite *Timberlane* test.[168]

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157. *Id.* By including the sunset dates in the occurrence-based coverage policies, reinsurers were effectively able to limit their liability to that which they would have been exposed to under claims-made policy forms.

158. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 469. *See generally* Reinsurance Technical Report-Law-Trying Times, *Reinsurance*, Feb. 1, 1994, at 25 (commenting on the continuing controversy around pollution exclusion clauses in CGL policies).

159. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 469.

160. *Id.*

161. *Id.*

162. In 1986, ISO, in conjunction with some of the defendants, agreed to develop certain standard CGL umbrella and excess policy language. *Id.* at 470. In June 1986, ISO released policy language providing for a "retroactive date on claims-made policies, a pollution exclusion, and a defense-costs cap within policy limits." *Id.*

163. All of the plaintiff states and two of the non-plaintiff states in which individual plaintiffs resided approved the ISO forms with the following exceptions: New York only approved the occurrence-based form, California and Colorado, having no procedure for approval, took no action, and Massachusetts and New Jersey disapproved the forms. *Id.* at 469.

164. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 469.

165. *See supra* part II.B.2.

166. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 486.

167. *Id. Cf.* McGlinchy v. Shell Oil Co., 845 F.2d 802, 815 (9th Cir. 1988) (finding no direct, substantial, and reasonably foreseeable effect on United States commerce where agreements involved orders for products in Southeast Asia and other areas outside the United States).

168. For a discussion of the *Timberlane* factors see *supra* notes 93-107 and accompanying text.

Regarding the first two prongs, the court determined that allegations that the defendants' conduct had a direct effect in the United States were sufficient to establish jurisdiction under *Timberlane*.[169] The court then addressed the third prong and focused the analysis on "whether 'the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction.' "[170]

The court placed heavy emphasis on the first factor under the third prong,[171] holding that "enforcement of the antitrust laws against activities in the London reinsurance market would lead to significant conflict with English law and policy."[172] Therefore, jurisdiction should not be exercised.[173] The court subsequently entered judgment on behalf of all the defendants and dismissed all pending federal claims.[174]

2. *The Court of Appeals*

The Ninth Circuit Court of Appeals affirmed the district court's conclusion that the FTAIA "is no bar to any of the plaintiffs' claims."[175] However, the court ultimately reversed the district court by finding that while the conflict with longstanding British policy on the underwriting of insurance pointed toward abstention, the remaining factors under *Timberlane*'s third prong pointed toward the appropriateness of exercising jurisdiction.[176] The court finally noted that the *Timberlane*

169. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 486-87.

170. *Id.* at 487.

171. The first factor is the degree of conflict with foreign law or policy. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976), *cert. denied*, 105 S. Ct. 3514 (1985).

172. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 489.

173. *Id.* at 489. With regard to the remaining six factors under the third prong, the court found:

> 1) that the nationality or allegiance of the parties and the locations of principal places of business of the corporations weighed against the exercise of jurisdiction;
> 2) that the improbability of enforcement of an eventual judgment "tip[ped] slightly against the exercise of jurisdiction;"
> 3) that the conduct of the defendants had a significant enough effect in the United States, as compared with effects elsewhere, "to make this factor weigh in favor of the exercise of jurisdiction;"
> 4) that plaintiffs' allegations that defendants' purpose was to restrict the availability of certain types of CGL insurance was not inconsistent with the existence of a legitimate business purpose for their actions, and thus this factor weighed against the exercise of jurisdiction;
> 5) the defendants conceded that the factor of foreseeability of the effect in the United States of their conduct weighed in favor of jurisdiction; and
> 6) that although the activities within the United States were not insignificant, their significance derived from the alleged foreign agreements. Thus this factor was considered to be neutral.

Id. at 489-90.

174. *Id.* at 491.

175. *In re* Insurance Antitrust Litig., 938 F.2d 919, 932 (9th Cir. 1991).

176. *Id.* at 922. With regard to the remaining six factors, the court held:

comity factors indicate that jurisdiction must be exercised when found to exist.[177]

3. The Supreme Court

The United States Supreme Court affirmed the Ninth Circuit by holding that U.S. antitrust laws apply to foreign conduct that is meant to produce, and does produce, a substantial effect in the United States.[178] Justice Souter began the majority's analysis by noting that the British defendants conceded Sherman Act jurisdiction over their London-based conduct.[179] Further, Justice Souter noted that because this issue arose pursuant to a motion to dismiss, allegations that the defendants engaged in conduct intended to have, and resulting in, a substantial effect on the U.S. insurance market must be presumed to be true.[180]

The majority opinion recognized the "well established [rule] . . . that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[181] Justice Souter noted that when enacting the FTAIA, Congress declined to express a view on whether a court with Sherman Act jurisdiction should ever decline to exercise that jurisdiction on the grounds of international comity.[182] The majority declined to reach that question because even assuming that a court might properly de-

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1) that the presence of American plaintiffs, many American defendants, and some American subsidiaries pointed towards the exercise of jurisdiction;
2) that substantial compliance could be achieved and thus this factor weighed in favor of jurisdiction;
3) the actions of the foreign defendants had "real economic consequences" for the American economy that strongly weighed in favor of the exercise of jurisdiction;
4) that the defendants' conduct was intended to have effects in the United States and thus this factor strongly weighed in favor of jurisdiction; and
5) that as the effects of the defendants' conduct were intended and substantial, their foreseeability became a strong factor favoring the exercise of jurisdiction.

The appellate court did not consider the last *Timberlane* factor: the relative importance of the conduct within the United States as compared with conduct abroad. *Id.* at 932-34.

177. *Id.* at 934.

178. Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2910 (1993). The Court also held that domestic insurers did not lose their McCarran-Ferguson Act immunity from federal regulation simply because they agreed or acted with foreign reinsurers allegedly not regulated by state law. *Id.* at 2903.

179. *Id.* at 2909. The British defendants contended, however, that the district court should have declined to exercise jurisdiction under the principles of international comity. *Id.* "Our position is not that the Sherman Act does not apply . . . Our position is that there are certain circumstances, and that this is one of them, in which the interests of another state are sufficient that the exercise of jurisdiction should be restrained". *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 2910.

cline to exercise Sherman Act jurisdiction, "international comity would not counsel against exercising jurisdiction in the circumstances alleged here."[183]

The Court upheld the Ninth Circuit's exercise of jurisdiction by finding that there was no conflict between U.S. and British law.[184] The Court reached this perfunctory conclusion despite the British defendants' argument that a conflict arose because the challenged conduct was consistent with British law and policy.[185]

The Court held that a true conflict does not exist "where a person subject to regulation by two states can comply with the laws of both."[186] In this case, the London-based reinsurers did not argue that British law required them to act in a manner prohibited by U.S. law, nor did they argue that compliance with the laws of both countries would be impossible.[187] Thus, there existed no true conflict and no consequential need to consider whether U.S. courts should decline to exercise jurisdiction on the basis of international comity.[188]

In his dissent, Justice Scalia argued that any nation having a basis for jurisdiction must refrain from exercising that jurisdiction if such an exercise would be unreasonable.[189] According to Justice Scalia:

> Rarely would these factors point more clearly against application of United States Law . . . . I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication, that Congress has made such an assertion.[190]

Justice Scalia argued that the majority "completely misinterpreted"[191] section 403 of the RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES. He characterized the majority's holding that no true conflict exists "unless compliance with United States law would constitute a violation of another country's law" as a

183. *Hartford*, 113 S. Ct. at 2910.

184. *Id.* at 2911.

185. *Id.* at 2910. The defendants, together with the British government which appeared as *amicus curiae*, argued that Parliament had established a comprehensive regulatory regime for London's reinsurance market and that the defendants' conduct in this case was consistent with that established law and policy. *Id.*

186. *Id.* at 2910 (citing RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. e (1987)).

187. *Id.* at 2911.

188. *Hartford*, 113 S. Ct. at 2911. "We have no need in this case to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Id.*

189. *Id.* at 2921 (citing RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987)).

190. 113 S. Ct. at 2921. Legislative jurisdiction refers to "[t]he sphere of authority of a legislative body to enact laws and to conduct all business incidental to its law-making function." BLACK'S LAW DICTIONARY 900 (6th ed. 1990).

191. *Id.* at 2922.

"breathtakingly broad proposition."[192] The dissent predicted that the majority's holding will "bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other foreign countries—particularly our closest trading partners."[193]

IV. ANALYSIS

A. *Effect of Court's Holding*

Rather than using *Hartford* as an opportunity to clarify the complexities of extraterritorial jurisdiction, the Court's decision is instead another contribution to the confusion and perplexity present in this area of law. *Hartford's* result leaves several important questions unanswered, has several significant consequences, and fails to set out a clear test to determine jurisdiction over foreign corporations.

1. *Questions Unanswered*

First, the majority noted that the FTAIA was intended to exempt from the Sherman Act *export* transactions that did not injure U.S. commerce.[194] The Court stated that the FTAIA's application to the challenged conduct was unclear given that the lower courts characterized the conduct as a limitation on the *import* of insurance into the United States.[195] However, the majority held that that question did not need to be addressed because, even assuming that the FTAIA did apply, the requirement of a "direct, substantial and reasonably foreseeable effect" on U.S. commerce was "plainly [met]" in this case.[196] Thus, questions remain as to what transactions the FTAIA actually applies to and whether *Hartford's* result would have been different had the FTAIA been found inapplicable in this case.

Second, the majority also failed to address whether the Court should ever decline to exercise jurisdiction on the grounds of international comity.[197] This issue was also not addressed when Congress enacted the FTAIA.[198] Under the Court's analysis, a U.S. court has jurisdiction over "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[199] However, if such an effect is present, a true conflict between U.S. and foreign law

192. *Id.* at 2921-22.
193. *Id.* at 2922.
194. *Id.* at 2909 n.23.
195. *Hartford*, 113 S. Ct. at 2909 n.23.
196. *Id.*
197. *Id.* at 2910.
198. *Id.*
199. *Id.*

should serve as the basis for consideration as to whether comity requires abstention from the exercise of jurisdiction.[200]

A true conflict arises, for example, where foreign law requires a defendant to act in a manner prohibited by U.S. law or when compliance with both the laws of the United States and the defendant's country is impossible. However, a true conflict actually arises in few instances. In many cases, the conduct at issue has been consistent with, permitted, encouraged, or otherwise approved by foreign law, and compliance with U.S. law has not been a violation of foreign law.[201] Thus, absent a true conflict, *Hartford* leaves open the question of whether and, if so, under what circumstances international comity requires a U.S. court to abstain from exercising jurisdiction.

This ambiguity has significant implications. In April 1992, the U.S. Department of Justice announced a new effort to attack conduct outside the United States that restrains U.S. exports, regardless of that conduct's lawfulness in the foreign jurisdiction.[202] This policy was reportedly the result of a then-recently appointed antitrust division assistant attorney general's decision to more aggressively pursue such conduct.[203] By failing to delineate when a true conflict arises, the *Hartford* decision may further encourage private plaintiffs, state attorneys general, and U.S. government enforcement agencies to pursue conduct outside the United States that is otherwise lawful.

2. *Consequences*

One important consequence of *Hartford* involves "blocking statutes"[204] and intergovernmental negotiations.[205] One can reasonably expect that foreign governments, enforcement authorities, and courts will use such measures to defend what they perceive to be their legiti-

200. *See* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 608-12 (9th Cir. 1976), *cert. denied*, 105 S. Ct. 3514 (1985).

201. *See, e.g.*, Continental Ore v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962); Williams v. Curtiss-Wright Corp., 694 F.2d 300, 303 (3d Cir. 1982); Mannington Mills Inc. v. Congoleum Corp., 595 F.2d 1287, 1293 (3d Cir. 1979).

202. Justice Department Will Challenge Foreign Restraints on U.S. Exports Under Antitrust Laws, 7 Trade Reg. Rep. (CCH) ¶ 50,804 (April 3, 1992). *See also* Joseph P. Griffin, *New U.S. Enforcement Policy is Assessed*, NAT'L L.J. March 16, 1992, at 23.

203. Rich Jaroslovsky, *Talking Tough*, WALL ST. J. July 2, 1993, at A1.

204. For example, the British Parliament enacted the Protection of Trading Interests Act in 1980. This act generally prohibits enforcement by U.K. courts of certain foreign judgments. Protection of Trading Interests Act of 1980 and Exchange of Diplomatic Notes Concerning the Act, ch. 11, *reprinted in* 21 INT'L. LEGAL MATERIALS 834 (1982).

205. For example, after the Justice Department announced its change in antitrust policy, Japanese government officials announced that Japan believed the U.S. policy violated the General Agreement on Tariffs and Trade. *Japanese Trade Ministry to Study Plan by U.S. to Extend External Reach of Antitrust Law*, Antitrust & Trade Reg. Rep. (BNA) ¶ 1560, at 479 (April 9, 1992).

mate sovereign interests when confronted with such aggressive behavior by U.S. plaintiffs.

Another important consequence of *Hartford* is the effect on the *Timberlane* abstention factors included in the balancing test for determining an exercise of jurisdiction.[206] *Hartford* provided the Court's first opportunity to comment on *Timberlane*'s analysis. In refusing to comment on *Timberlane*, the Court stated only that there was no need to discuss other considerations that may have affected the *Hartford* decision.[207] This statement suggests, at least by implication, that the *Timberlane* analysis survives. Yet, by not applying the *Timberlane* factors to the challenged conduct, the Court left unanswered the question of whether *Timberlane* has the support of the Court and, if so, how the Court would apply the factors.

Equally ambiguous is whether the *Timberlane* analysis for extraterritorial application of antitrust laws has been superseded by the FTAIA.[208] However, in analyzing *Hartford*, the Court did not acknowledge that the FTAIA superseded *Timberlane*, nor did it embrace the *Timberlane* test. The Court merely found that nothing in the FTAIA precluded jurisdiction over the British reinsurers.[209]

3. Failure to State Test

Finally, and perhaps most significant, the Supreme Court failed to define the test for determining jurisdiction over foreign corporations. Because the London reinsurers failed to argue that British law required them to act in some fashion prohibited by U.S. law, the Court merely decided that there was no conflict of law.[210] The *Hartford* decision thus leaves future litigants with no clearer framework within which to analyze the issue of extraterritorial jurisdiction.

Hartford afforded the Court the opportunity to shed light on the current state of the law controlling extraterritorial jurisdiction. By not identifying when a true conflict of law arises or when international comity militates against exercising extraterritorial jurisdiction, the Court left more questions unanswered than solved. Given the potential for international concern regarding this decision,[211] a better analy-

206. *See supra* notes 94-107 and accompanying text.

207. "We have no need in this case to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2911 (1993).

208. The FTAIA arguably codifies the standard for determining whether there is extraterritorial jurisdiction for all cases, not only those involving export transactions. *See In re* Insurance Antitrust Litig., 723 F. Supp. 464, 486 n.28 (N.D. Cal. 1989).

209. *See supra* part III.D.3.

210. *Hartford*, 113 S. Ct. at 2911.

211. *See, e.g.*, Lloyd's List, USA: London Reinsurance Market May Face US Legal Interference After Court Ruling, July 6, 1993 (noting that Court's decision to exert extraterritorial jurisdiction puts the U.S. and Britain on a collision course).

sis would have recognized *Timberlane* as the controlling standard and would have fully developed each *Timberlane* factor.

B. Suggestions and Recommendations

There are a number of compelling reasons why the Supreme Court should have analyzed *Hartford* under *Timberlane*'s framework. First, while many of the circuit courts have fully analyzed and developed *Timberlane*'s factors,[212] the Court has never addressed the standard. The Court had the opportunity to clarify *Timberlane*'s legitimacy and applicability to extraterritorial cases. Second, development and analysis of *Timberlane*'s factors would have provided guidance for current and prospective litigants, as well as foreign businesses making decisions that may ultimately have an effect in U.S. markets. Finally, *Timberlane* is also the most exhaustive jurisdictional test. Given the fact that foreign policy concerns are fundamental to the question of extraterritoral jurisdiction, jurisdictional analysis warrants focused judicial attention to these concerns by means of the *Timberlane* test.

Because the Court neither embraced nor overruled *Timberlane*, one may reasonably assume that *Timberlane* survives the *Hartford* decision and remains the majority rule for deciding similar cases. However, because the Court failed to analyze each prong, future litigants have no greater understanding regarding how to present extraterritorial cases. The following analysis applies the *Timberlane* factors to *Hartford*'s facts to provide further insight into interpreting the *Timberlane* standard.[213]

1. The First Timberlane *Prong: The Effect on U.S. Commerce*

The first *Timberlane* prong requires that the alleged restraint affect, or be intended to affect, the foreign commerce of the United States.[214] In *Timberlane*, the court intended this element to be less demanding than the formal effects test articulated in *Alcoa*,[215] which requires a

212. *See supra* notes 108-122 and accompanying text.

213. Alternatively, litigants and businesses confronted with extraterritorial jurisdictional questions may also look to *Hartford*'s dissent, because the dissent is more complete in analyzing the international comity issues. Although Justice Scalia uses the factors set forth in § 403 of the RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES to determine whether the notion of international comity would require abstention in this case, his analysis is helpful in determining how this case might have been decided had the Court chosen to utilize *Timberlane*'s framework. The analysis is helpful because Justice Scalia chose to perform an indepth analysis of the case rather than merely follow the majority's path of citing procedural deficiencies as a basis for the holding.

214. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976), *cert. denied*, 105 S. Ct. 3514 (1985).

215. *See supra* notes 76-82 and accompanying text for a discussion of *Alcoa*'s effects test.

showing of "substantial effect" at the first stage of the analysis.[216] As long as there was some effect on U.S. commerce, there was sufficient basis for moving to the next prong of the test.[217]

This test is disposed of with relative ease when applied to *Hartford*. The plaintiffs' allegations of conspiracy and restraint of trade, combined with the fact that the defendants intended these results,[218] show that there was some effect on U.S. commerce as a result of the defendants' actions. Thus, the first *Timberlane* prong is satisfied under these facts.

2. *The Second* Timberlane *Prong: Whether the Restraint is a Violation of U.S. Antitrust Laws*

The second *Timberlane* prong addresses whether the alleged restraint is of the type and magnitude to constitute a violation of U.S. antitrust law. This prong turns on the substantive scope of the Sherman Act rather than on the Act's territorial reach.[219] This element of the test is jurisdictional only in that the court cannot hear the complaint if the complaint fails to allege a substantive claim under the Sherman Act.

To satisfy this prong, then, a plaintiff has what appears to be the relatively easy task of establishing a substantive violation of the Sherman Act. As proof of this point, the district court in *Hartford* disposed of this element with one sentence in holding that the plaintiffs' allegations established a direct effect in the United States and provided sufficient foundation for that court's Sherman Act jurisdiction.[220] The

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216. *Timberlane*, 549 F.2d at 613.

217. *Id.* Although other courts have not addressed this lower standard, both the *Uranium* and *Mannington Mills* courts have indicated a preference for the higher *Alcoa* standard. *See In re* Uranium Antitrust Litig., 617 F.2d 1248, 1255 (7th Cir. 1980); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291-92 (3rd Cir. 1979). For an excellent discussion of these different approaches, *see* ATWOOD & BREWSTER, *supra* note 12, § 6.14, at 166 (1st ed. 1961).

218. *See supra* part III.C for a detailed discussion of the facts of *Hartford*.

219. The *Timberlane* court cited two sources which indicate that the magnitude of an effect is an issue of substantive law rather than jurisdiction. *Timberlane*, 549 F.2d at 613 (citing Occidential Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 102-03 (C.D. Cal. 1971), *aff'd on other grounds*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972) (noting confusion regarding the extent to which restraints must affect commerce); Michael F. Beausang, *The Extraterritorial Jurisdiction of the Sherman Act*, 70 DICK. L. REV. 187, 191 (1966) (stating that "a direct and substantial 'effect' is necessary for Sherman Act *violations*") (emphasis in original)). Further, the Court, in restating this prong, indicated that the question is whether "[the alleged restraint] is . . . of such a type and magnitude so as to be cognizable as a violation of the Sherman Act," thus indicating that the second element is more substantive in nature. *Timberlane*, 549 F.2d at 615.

220. *In re* Insurance Antitrust Litig., 723 F. Supp. 464, 486 (N.D. Cal. 1989). Specifically, the court held that the FTAIA was no bar to the plaintiffs' conduct. *Id.* The court noted that "[t]he subject matter of the [defendants'] alleged agreement, however, concerned the provision of reinsurance within the United States, and the allegations of

Ninth Circuit affirmed the district court's decision merely by holding that "the FTAIA is no bar to any of the plaintiffs' claims."[221] The Supreme Court held that "it is well established . . . that the Sherman Act applies to conduct that was meant to produce and did in fact produce some substantial effect in the United States."[222]

Given the minimal requirements of this element and the fact that the district and appeal courts found for the plaintiff on this element on the basis of mere allegations, this is the least difficult *Timberlane* prong to satisfy. Litigants will be wise to focus less attention here and concentrate on the more important balancing test required under the third prong.

3. The Third Timberlane *Prong: The Balancing Test*

The final *Timberlane* prong is the most important.[223] Under this test, the question is "whether the interests of, and the links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong vis-a-vis those of other nations, to justify an assertion of extraterritorial authority."[224]

This balancing process must be an integral part of any jurisdictional analysis. This is exemplified by *Timberlane*'s own use of a seven-factor balancing test as a partial substitute for much of *Alcoa*'s effects test.[225] The importance of this process is also supported by common sense—each nation's interests deserve close judicial scrutiny and consideration.

The remainder of this section presents a fact-specific analysis of *Hartford* under *Timberlane*'s balancing test. Future litigants must recognize that *Timberlane*'s is a fact specific test that demands a case-by-case analysis of the relative weight of each of the test's factors. Different facts may result in more or less weight being apportioned to each factor.

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effects in United States markets are sufficient to preclude [application of the FTAIA]." *Id.* By finding that the effects of the defendants' conduct were sufficient to preclude application of the FTAIA, the district court impliedly found that the defendants' conduct met the Sherman Act's "direct, substantial and reasonably foreseeable" test. *Id.* (citing McGlinchy v. Shell Oil Co., 845 F.2d 802, 815 (9th Cir. 1988)).

221. *In re* Insurance Antitrust Litig., 938 F.2d 919, 932 (9th Cir. 1991).

222. Hartford Fire. Ins. Co. v. California, 113 S. Ct. 2891, 2909 (1993) (citations omitted). "Such is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced some substantial effect." *Id.* (footnote omitted).

223. ATWOOD & BREWSTER, *supra* note 12, § 6.10, at 161 (2d ed. 1981) ("The most important element of [*Timberlane*'s] test [is] the third, the balancing process . . .").

224. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976), *cert. denied*, 105 S. Ct. 3514 (1985).

225. *Id.* at 611-613.

a. Degree of Conflict with Foreign Law or Policy

The first factor under *Timberlane*'s third prong requires a balancing of the conflicts, if any, that exist between each sovereign's law and policy.[226] As previously mentioned, London has a long and well-established policy of regulating its insurance and reinsurance markets.[227] However, the United States also has an established tradition of antitrust laws. The evidence of conflict between U.S. antitrust laws and English insurance law and policy is substantial.[228]

On balance, enforcement of U.S. antitrust laws against activities that took place wholly within London's well-regulated reinsurance market would lead to significant conflict with English law and policy. The *Hartford* Court would have thus been prohibited from exercising jurisdiction based on the first factor under the third prong.

b. The Nationality or Allegiance of the Parties and the Locations of Principal Places of Business

Under the third prong's second factor, a court weighs the burden, if any, that adjudication in U.S. courts would place on the litigants. To determine this, the court looks at the nationality, allegiance, and the location of the parties' principal places of business.[229]

All the plaintiffs in *Hartford* were located in the United States. Although some of the defendants were located in England and were of English nationality, many of the corporate defendants were subsidiaries of American corporations.[230]

However, adjudication of this case would have required testimony of witnesses and the production and analysis of documents located primarily in England. Thus, the nationality or allegiance of the parties and the locations of the defendants' principal places of businesses would likely weigh against the exercise of jurisdiction.

c. The Extent to Which Enforcement by Either State Can Be Expected to Achieve Compliance

Under this factor, a court examines whether there are significant barriers that would preclude enforcement of a judgment against the defendant.[231]

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226. *Id.* at 614.

227. *See supra* part III.B.

228. *See, e.g.*, Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 946 (D.C. Cir. 1984).

229. *Timberlane*, 549 F.2d at 614.

230. For an exhaustive list of *Hartford*'s plaintiffs and defendants, see *In re* Insurance Antitrust Litig., 723 F. Supp. 464, 491 (N.D. Cal. 1989) (Appendix). There are over 90 parties listed. *Id.*

231. *Timberlane*, 549 F.2d at 614.

In *Hartford*, there were a number of barriers that would have affected an American court's ability to enforce a judgment against the English defendants. For example, the British Parliament has enacted blocking statutes that prohibit enforcement of certain foreign judgments by U.K. courts, and allow the British Secretary of State for Industry to forbid British nationals to comply with foreign antitrust judgments.[232]

Although *Hartford*'s plaintiffs would be entitled to collect on an eventual judgment against the defendants' assets located in the United States, these blocking statutes would render enforcement of the plaintiffs' requested injunctive relief in England improbable. Thus, expected compliance weighed against an exercise of jurisdiction.

d. The Relative Significance of Effects on the United States as Compared with Those Elsewhere

Under the third prong's fourth factor, a court weighs the effect, if any, that the defendant's alleged conduct will have in the United States against the effect, if any, elsewhere.[233] The plaintiffs in *Hartford* alleged that half of the reinsurance business at issue covered risks undertaken in North America.[234]

The plaintiffs did not allege, however, what percentage of those risks involved U.S. CGL policies that were the subject of the case. Moreover, the plaintiffs did not allege the effects that the defendants' retrocessional reinsurance agreements would have had in U.S. markets. Nonetheless, the defendants' conduct would have had a sufficient impact in the United States so as to make this factor weigh in favor of a jurisdictional exercise.

e. The Extent to Which There is an Explicit Purpose to Harm or Affect United States Commerce

Under this factor, a court determines whether there is explicit intent to affect or harm U.S. commerce through the defendant's conduct.[235] If there is intent, this element may still not weigh against the defendant if the defendant can show a legitimate business purpose for the conduct.

The conduct of the *Hartford* defendants was aimed primarily at reducing the defendants' exposure to certain risks and controlling losses, both of which are legitimate business purposes.[236] The fact that the defendants intended to restrict various types of insurance cover-

232. *See supra* note 204 and accompanying text for a discussion of blocking statutes.
233. *Timberlane*, 549 F.2d at 614.
234. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 489.
235. *Timberlane*, 549 F.2d at 614.
236. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 490.

age, therefore, is not inconsistent with a legitimate business purpose.[237] Thus, this factor weighed against an exercise of jurisdiction.

f. Foreseeability of Such Effect

Under this factor, a court examines the extent to which the defendants were aware of the potential effects their behavior would have on U.S. markets.[238] In *Hartford*, the defendants were obviously aware of the potential effects their conduct would have in the United States. Indeed, the defendants conceded this point at trial.[239] Thus, the factor of foreseeability weighed in favor of an exercise of jurisdiction.

g. The Relative Importance to the Violations Charged of Conduct Within the United States as Compared with Conduct Abroad

Under this last factor, a court weighs the significance that actions taken by the defendants in the United States have against actions taken elsewhere.[240] Based on the attention this factor received at the trial court level, litigants would be wise to thoroughly address this factor.

The *Hartford* defendants were alleged to have coerced primary insurers in the United States and to have communicated with ISO in an effort to have the occurrence form rejected.[241] The district court found that although these activities were not insignificant, they derived their significance from agreements undertaken in London.[242] Consequently, the district court held that the relative importance of the conduct within the United States as compared to conduct abroad must be considered neutral with respect to an exercise of jurisdiction.[243]

However, the alleged activities in the United States were incidental to the agreement that occurred in London and this agreement was the gravamen of the action. The resulting U.S. activities were less significant when compared with those that took place in London, thus this factor should have ultimately weighed against an exercise of jurisdiction.

On the basis of this analysis, one may reasonably conclude that an exercise of jurisdiction in this case would result in a conflict with established English law and policy. Moreover, this conflict was not mitigated by the existence of other factors that would support such an exercise. Consequently, had the Supreme Court chosen to analyze this case by applying the *Timberlane* test rather than merely relying on a

237. *Id.*
238. *Timberlane*, 549 F.2d at 614.
239. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 490.
240. *Timberlane*, 549 F.2d at 614.
241. *In re Insurance Antitrust Litig.*, 723 F. Supp. at 490.
242. *Id.*
243. *Id.*

procedural deficiency,[244] the Court would have rejected the exercise of extraterritorial jurisdiction.

V. CONCLUSION

Hartford illustrates the inadequacy and continued confusion in existing approaches to determining whether courts should exercise jurisdiction in cases involving foreign activities. Unfortunately, the *Hartford* decision is of little probative value in the area of extraterritorial jurisdiction. The decision leaves more questions unanswered than resolved because the Supreme Court failed to define a test for determinig jurisdiction over foreign corporations.

Future litigants would be wise to force the Court to resolve the questions left unanswered in *Hartford* by continuing to raise the issues addressed in *Timberlane*. However, until the Court addresses these issues directly, current and prospective litigants, as well as multi-national businesses whose conduct may ultimately affect U.S. markets, will have to base their decisionmaking on the current state of confusion and disarray in the area of extraterritorial jurisdiction.

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244. Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2911 (1993) (Scalia, J., dissenting) (noting that the majority decision was based primarily on a determination that no conflict existed between the laws of England and the United States).